



# COMMONWEALTH of VIRGINIA

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May 23, 2014

Martin M. McMahon, Esquire  
County Attorney for the County of Montgomery  
755 Roanoke Street, Suite 2F  
Christiansburg, Virginia 24073-3182

Dear Mr. McMahon:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire whether a member of a county board of supervisors vacates his position on the board by accepting temporary employment that will require him, while so employed, to live outside the district he represents, but where his intent is to retain his domicile within that district.

## Response

It is my opinion that a member of a county board of supervisors does not vacate his elected office as a county supervisor solely due to an absence from his electoral district to engage in temporary employment, provided that he maintains his domicile within his electoral district and intends to return there upon the termination of the temporary employment.

## Background

You relate that a member of the Board of Supervisors of Montgomery County is considering seeking an employment position that would require him to live for approximately nine months per year at a work site outside the district he was elected to represent, but still within Montgomery County. He has represented to you that he will continue to own his legal residence within the district, does not intend to change his domicile, and will return to his home within the district once the new employment ends. The initial term will be for three years, subject to annual performance reviews, and it may also be renewed for a second three-year term.

## Applicable Law and Discussion

Both constitutional and statutory provisions govern the qualifications to hold elective office in Virginia.<sup>1</sup> These provisions require that, to hold elective office, an individual must be qualified to vote

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<sup>1</sup> See, e.g., VA. CONST. art. II, §§ 1, 5; VA. CODE ANN. § 24.2-500 (2011).

for that office.<sup>2</sup> To be recognized as a “qualified voter,” an individual must meet three qualifications: he must (i) be of legal age to vote, (ii) reside both within the Commonwealth and within the precinct in which he will vote, and (iii) be a registered voter.<sup>3</sup> Further, with respect to holding local office specifically, § 15.2-1525 of the *Code of Virginia* requires every county officer, at the time of his election or appointment, to have resided in the locality for 30 days preceding his election.<sup>4</sup> Such county officers include members of a county board of supervisors.<sup>5</sup> Section 15.2-1526 further provides that when an officer subject to this requirement removes himself from the county, city, town or district for which he was elected during his elective term, “his office shall be deemed vacant.”<sup>6</sup> A “nonresident of a locality is not eligible to hold an office within the locality.”<sup>7</sup>

For purposes of voting, and thus holding elective office, Virginia law provides that “residence” and “resident” require “both domicile and a place of abode.”<sup>8</sup> To establish domicile, a voter or candidate “must live in a particular locality with the intention to remain.”<sup>9</sup> To satisfy the “place of abode” requirement, an individual must have a physical dwelling place within the relevant jurisdiction.<sup>10</sup> When one maintains several abodes, domicile will control what constitutes residence for purposes of voting and holding elective office.<sup>11</sup> As established in the cases discussed below, residence and domicile - terms that are sometimes used interchangeably - are both governed by intent.

In determining residence pursuant to those provisions, the Supreme Court of Virginia has given significant weight to the intent accompanying an officer’s presence in a particular district.<sup>12</sup> The Court has explained that, where an individual “[leaves] his original residence with the intention of returning, such original residence continues in law, notwithstanding the temporary absence of himself and family.”<sup>13</sup> Mere absence from a fixed home, however long continued, cannot work the change. Indeed, the Supreme Court of Virginia has held that a college student who lives in Virginia for several years has not established residency here, despite the length of time spent here, in the absence of evidence that he

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<sup>2</sup> VA. CONST. art. II, § 5.

<sup>3</sup> VA. CODE ANN. § 24.2-101 (Supp. 2013); *see also* VA. CONST. art. II, § 1.

<sup>4</sup> VA. CODE ANN. § 15.2-1525 (2012).

<sup>5</sup> *See* § 15.2-1400(A) (2012) (providing that the qualification for office as a member of local governing body is governed by § 15.2-1522 et seq.).

<sup>6</sup> Section 15.2-1526 (2012).

<sup>7</sup> 2003 Op. Va. Att’y Gen. 104, 107.

<sup>8</sup> VA. CONST. art. II, § 1; VA. CODE ANN. § 24.2-101.

<sup>9</sup> Section 24.2-101.

<sup>10</sup> *Id.*; *see* 1993 Op. Va. Att’y Gen. 33, 40.

<sup>11</sup> 1992 Op. Va. Att’y Gen. 108, 110 (citing 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 352 (1974)).

<sup>12</sup> *See, e.g.,* *Kegley v. Johnson*, 207 Va. 54, 58, 59, 147 S.E.2d 735, 737, 738 (1966) (“The crucial factor, then, in the case before us, is [the prospective voter’s] intention with respect to his stay in Albemarle County. . . . We simply say that [his] presence in [the] County, without the requisite domiciliary intent, was not sufficient to qualify him as a resident for voting purposes.”).

<sup>13</sup> *Dotson v. Commonwealth*, 192 Va. 565, 571, 66 S.E.2d 490, 493 (1951) (discussing whether a member of the board of supervisors of Dickenson County who relocated to Wise County vacated his office). *See Williams v. Commonwealth*, 116 Va. 272, 277, 81 S.E. 61, 63 (1914) (holding that “[a] legal residence, once acquired by birth or habitancy, is not lost by temporary absence for pleasure, health, or business, or while attending to the duties of a public office.”).

intends to abandon his prior residence in Florida.<sup>14</sup> It has also held that a citizen who established extensive, wide-ranging, and meaningful ties to a Virginia community over a period of several years was not a Virginia resident because he did not intend to give up his legal domicile in West Virginia.<sup>15</sup>

As to domicile, “[t]here must be the *animus* to change the prior domicil[e] for another.”<sup>16</sup> Moreover, “[w]here a man has two places of living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention.”<sup>17</sup> There is a presumption that a domicile once acquired subsists until a change is proved, and the burden of proving the change is on the party alleging it.<sup>18</sup> Accordingly, I conclude that an officer will not be deemed to have vacated his elected office unless he also demonstrates an intention to establish a permanent residence outside of his original district.<sup>19</sup>

Finally, as to “place of abode,” the facts under consideration entail the supervisor being required to live outside his district for only nine months per year and retaining ownership of his home within his district, with the intent to return to it. Under these facts, he has a physical dwelling place<sup>20</sup> within the district and thus satisfies the requirement of having a “place of abode” within the district.

### Conclusion

The question of intent is a fact-specific inquiry, and domicile is “determined by considering relevant factors establishing a person’s intent to remain in the jurisdiction.”<sup>21</sup> As a result, whether a particular person fulfills the residency requirements for holding an elective office is a question beyond the scope this Opinion.<sup>22</sup> Nevertheless, it is my opinion that, as a general rule, when a member of a county board of supervisors relocates to another district within the county for a temporary job for nine months a year, with the intent to continue owning his home and maintaining his domicile within the district from

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<sup>14</sup> *Kegley*, 207 Va. at 54, 147 S.E.2d at 735.

<sup>15</sup> *Cooper’s Adm’r v. Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917). The community ties included including building and owning a home there, becoming an officer and stockholder of several Virginia corporations, serving as president of the local board of trade, transferring his church membership there, sending his children to public schools there as residents, and re-interring his two deceased children there.

<sup>16</sup> *Id.* at 347, 93 S.E. at 682 (italics in original) (quoting *Lindsay v. Murphy*, 76 Va. 428 (1882)), *accord* *Harrison v. Harrison*, 58 Va. App. 90, 103, 706 S.E.2d 905, 912 (2011). I note that, although not necessarily conclusive, the length of the absence likely is a factor in determining intent.

<sup>17</sup> *Dotson*, 192 Va. at 571, 66 S.E.2d at 493.

<sup>18</sup> *Williams*, 116 Va. at 278, 81 S.E. at 63.

<sup>19</sup> *Dotson*, 192 Va. at 573, 66 S.E.2d at 494 (An individual “does not acquire a domicile where he is if he has no intention of staying there and had no intention of abandoning his former home when he left there.”); *Williams*, 116 Va. at 277-78, 81 S.E. at 63 (“a man’s legal residence is not changed when he leaves it for temporary purposes and transient objects, meaning to return when those purposes are answered and objects attained.”) (citation omitted). *See Dixon*, 83 Va. Cir. at 372 (quoting Ruling of the Tax Comm’r, No. 10-32 at 2 (Apr. 8, 2010) (“In order to change from one legal domicile to another legal domicile, there must be (1) an actual abandonment of the old domicile, coupled with an intent not to return to it, and (2) an acquisition of a new domicile at another place, which must be formed by personal presence and an intent to remain there permanently or indefinitely.”)).

<sup>20</sup> VA. CODE ANN. § 24.2-101.

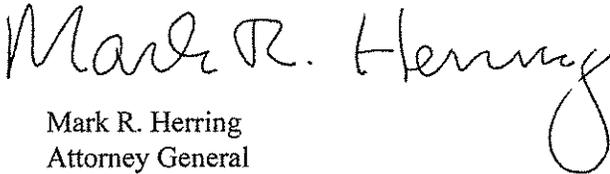
<sup>21</sup> 1993 Op. Va. Att’y Gen. at 39.

<sup>22</sup> The Attorney General refrains from issuing opinions on matters requiring a determination of fact rather than law. *See, e.g.*, 2006 Op. Va. Att’y Gen. 12 and citations therein. *See also* 2009 Op. Va. Att’y Gen. 80, 81 and n.17 (“Attorneys General consistently have declined to render official opinions on specific factual matters . . .”).

which he was elected, and with the intent to return home after completion of his temporary employment, he has not taken up automatically, or as a matter of law, a new residence for purposes of § 15.2-1526.<sup>23</sup> Thus, he has not vacated his elected office.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>23</sup> “Once a person has established domicile, establishing a new domicile requires that he intentionally abandon his old domicile.” *Dixon*, 83 Va. Cir. at 373 (quoting State Board of Elections Policy 2009-005).